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No. 79-1056

IN THE

Supreme Court of the United States

October Term, 1980

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

AND

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF NORTHWEST AIRLINES, INC.

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QUESTIONS PRESENTED

1. Whether labor unions that cause or join violations of federal employment discrimination laws (Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963) are nevertheless immune from an employer's claim for contribution for a portion of the backpay awarded in a suit against the employer alone, even though the unions are equally liable for the discriminatory practices.

2. Whether, if employers may obtain contribution against unions for backpay awards based on federal employment discrimination laws, any special rules of timeliness or procedure must be superimposed upon the rules that ordinarily govern the assertion of contribution claims in the federal courts.

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BRIEF OF NORTHWEST AIRLINES, INC.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. D) is reported at 606 F.2d 1350 (D.C. Cir. 1979) and the opinion of the district court (Pet. App. B) at 82 Lab. Cas. ¶33,549 and 14 E.P.D. ¶7730 (D.D.C. 1977).

JURISDICTION

The judgment of the court of appeals (Pet. App. G), superseding an earlier order (Pet. App. E), was entered on October 5, 1979, and a timely petition for rehearing was denied on October 9, 1979 (Pet. App. H). A timely

petition for certiorari was filed on January 4, 1980. Certiorari was granted on June 16, 1980. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The pertinent provisions of the statutes involved, the Equal Pay Act of 1963, 29 U.S.C. §§ 206(d), 216(a)-(d), 217, and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, are set forth in Appendix A to the petition for certiorari.

STATEMENT

This case arises from the efforts of Northwest Airlines, Inc., to obtain contribution from two labor unions for part of the backpay assessed against Northwest in an employment discrimination suit brought by a class of Northwest's cabin attendants, *Laffey v. Northwest Airlines, Inc.*[1] As alleged in Northwest's complaint against the unions, a large part of the backpay award is directly attributable to an employment practice for which the respondent unions, which represented the cabin attendants during the backpay period, were at least partially responsible.[2]

A. The Underlying Employment Discrimination Claim Concerning The Pay Differential.

The original class action against Northwest was commenced in 1970 by 40 women cabin attendants. They challenged, among other things, the wage scale for cabin

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[1] 366 F. Supp. 763 (D.D.C. 1973) and 374 F. Supp. 1382 (D.D.C. 1974), *aff'd in part, vacated in part and remanded*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

[2] These allegations must be accepted as true, since the case comes before this Court on the unions' motions to dismiss. *See Scheuer v. Rhodes*, 416 U.S. 232, 236-37 (1974). The findings of the district court in the underlying class action are cited when relevant to provide background.

attendants as established in collective bargaining. Under the collective bargaining agreements in force during the prior 20 years, one classification of cabin attendants—purser—received a higher rank and rate of pay than cabin attendants in the other two classifications—stewardess and flight service attendant ("FSA").

The higher pay and rank of pursers under the collective bargaining agreements reflected the pursers' extra duties and supervisory responsibilities. Modeled on the purser position in maritime service, Northwest's pursers were assigned primarily to international flights and were given specific supervisory duties involving international documentation and the handling of aircraft cargo, in addition to overall responsibility for service to passengers in the cabin. 366 F. Supp. at 766 (¶11), 783-785 (¶¶61-63).

Pursers constituted about five percent of the total number of cabin attendants flying for Northwest. 366 F. Supp. at 767 (¶¶18-20). This small, specialized group was greatly outnumbered by the other cabin attendants, the stewardesses and FSAs, who were equal in rank and were paid on the same wage scale, lower than that of pursers. In accordance with the maritime tradition, Northwest's purser complement was limited to men from the time the position was created in 1947 until shortly after Title VII took effect, when a new contract was signed in 1966. At the time suit was filed, however, almost all pursers were men and most of the lower paid cabin attendants were women.

The stewardesses attacked the pay differential between pursers and the lower-ranking cabin attendant positions, alleging that all cabin attendants actually performed "equal" work and that by paying stewardesses less than male pursers, Northwest was discriminating against stewardesses on the basis of sex, in violation of the Equal Pay Act of 1963 and the sex-discrimination provisions of Title VII of the Civil Rights Act of 1964.

B. The Participation Of The Unions In Establishing And Maintaining The Pay Differential.

Respondent TWU was the certified bargaining representative for all Northwest cabin attendants from 1961 until September 1971. At that time, respondent ALPA was certified to replace TWU (JA 16-17 ¶5). The pay differential between pursers, on the one hand, and FSAs and stewardesses, on the other, had been established and preserved during the entire period through collective bargaining, with the active participation of these unions (JA 17-18 ¶6).

The service of the *Laffey* complaint upon Northwest in 1970 was the first indication Northwest had that anyone viewed all Northwest cabin attendant positions as involving "equal" work and as entitling all cabin attendants to the higher salaries established as reasonable for the five percent who served as pursers. As the district court in *Laffey* ultimately found, neither TWU nor any individual cabin attendant had made such an allegation to Northwest prior to the commencement of the suit. 374 F. Supp. at 1390. The court expressly found that Northwest had reasonable grounds for its belief that the purser position was not equal to the other cabin attendant jobs. These grounds included not only the traditional practice by Northwest and other international airlines but also "the acquiescence of the stewardesses' bargaining representative in this arrangement . . . ." *Id.*

The unions' role in perpetuating the differential was more than mere acquiescence. Collective bargaining agreements between Northwest and each respondent union defined the duties of each classification of cabin attendant. These definitional provisions in the contracts were examined and revised periodically in collective bargaining; they expressly assigned to the purser the extra responsibilities not borne by the other cabin attendants. 366 F. Supp. at 766 (¶¶10-12). Accordingly, reflec-

ting what was believed to be the pursers' additional responsibilities, each collective bargaining agreement during the period perpetuated the pay differential. The differentials were "demanded" by each union as an "integral part of the collective bargaining negotiations," and each succeeding contract signed by Northwest and the unions—even after the *Laffey* suit was filed—defined the existence and amount of the pursers' entitlement to greater compensation (JA 17-18 ¶6).

The bargaining position of the incumbent cabin attendants' union on the pursers' entitlement to higher pay never wavered. It persisted even after the entire airline industry became sensitized to the demands of the new federal employment discrimination statutes. For example, in the negotiations leading to the 1967 contract, TWU, whose membership was overwhelmingly female, successfully pressed for a contract change allowing women to be promoted to purser. But TWU never once suggested that the purser position was "equal" to the other cabin attendant positions and that the pay differential should therefore be eliminated. On the contrary, the union demanded continuation of the differential (JA 17-18 ¶6). *See* 366 F. Supp. at 765-766 (¶8), 767-768 (¶23). The contract negotiated by ALPA and signed in December 1972, in the midst of the *Laffey* trial, preserved the pay differential between pursers and stewardesses—although not as large as ALPA had demanded.

The plaintiffs in *Laffey* sued only Northwest. The failure of the class action plaintiffs to assert any monetary claims against TWU, the incumbent union at the time the complaint was filed, was not surprising, since the lead plaintiff in *Laffey* had been a member of the union bargaining committee that had negotiated one of the contracts perpetuating the differential. In March 1972, after ALPA replaced TWU as the incumbent bargaining agent, ALPA was brought into the case by the plaintiffs as

a non-aligned party. This step was taken solely to effectuate any prospective relief that might require departures from the collective bargaining contract; the plaintiffs sought no backpay from ALPA.

C. The Determination Of Northwest's Liability.

Following trial, the district court in November 1973 determined that the contractually defined differences between the pursers and the other cabin attendants were legally insufficient to justify the wage differentials established through collective bargaining. As a result, the district court concluded that the pay differential constituted sex discrimination in violation of Title VII and the Equal Pay Act. An injunctive decree awarding backpay and other relief to stewardesses was entered against Northwest in April 1974, and a judgment was filed in May of that year.

If the determination that the differential violated Title VII and the Equal Pay Act survives Northwest's pending challenges, Northwest will be obligated to pay several thousand stewardesses backpay based on the amounts that they would have earned if they had been pursers—backpay over and above the wages that were the agreed-upon, collectively bargained compensation for both men and women who were not pursers. The award in favor of the class on this claim is presently calculated at $37,000,000, making it one of the largest awards, perhaps the largest, in any employment discrimination case.

D. The Efforts To Obtain Contribution.

Northwest's contribution claim against TWU and ALPA is an effort to allocate to the unions their fair share of that portion of the backpay award attributable to the collectively bargained purser pay differential. Northwest first sought to assert its contribution claim in the *Laffey* case. In May 1974, eight days after the entry of judgment

holding Northwest liable for the backpay, Northwest sought to assert a cross-claim against ALPA and a third-party claim against TWU (JA 18-19 ¶¶7-8). The district court declined to permit Northwest to assert the claims.

In February 1975, while Northwest was appealing that ruling in *Laffey* as well as the adverse determination on the merits, it filed the present, separate suit against both unions, seeking a declaratory judgment that the unions would be liable for a fair portion of any backpay for which Northwest might finally be held liable on account of the purser pay differential.[3] In response to the unions' motion to dismiss the contribution suit, the district court held that Northwest may seek contribution for amounts awarded under Title VII, but not for amounts awarded pursuant to the Equal Pay Act (Pet. App. B and C).

Cross-appeals were permitted (JA 46-51). The court of appeals agreed with the district court that contribution is not available with respect to amounts awarded under the Equal Pay Act. The court also vacated the district court's ruling that contribution is available under Title VII, and remanded the case to the district court to consider whether Northwest's claim for contribution is barred by laches because Northwest had not immediately impleaded the unions in the *Laffey* case (Pet. App. D and G). Northwest then sought review by this Court.

SUMMARY OF ARGUMENT

I

A. Contribution is an equitable remedy that apportions an injured party's recovery among all persons who are responsible for having caused the injury, even when not all are sued by the injured party. In accordance with

[3] In 1976 the court of appeals upheld the district court's refusal to allow assertion of the contribution claim in the *Laffey* case. 567 F.2d at 476-78.

the prevailing American rule in favor of contribution, this Court and lower federal courts have properly recognized contribution for federally created liability in a variety of settings.

B. Under both the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, there exists the basic prerequisite for contribution between employer and union for employment discrimination liability. Both statutes equally prohibit unions and employers from engaging in discriminatory practices and impose monetary liability on each when their practices cause injury. Congress understood that unions sometimes cause employment discrimination, and independent liability for union-caused discrimination was viewed as essential to the legislative schemes. Union financial liability for causing wage discrimination is clear under the terms and history of both Title VII and the Equal Pay Act, and under a union's duty of fair representation.

When an employer or union alone is sued for a discriminatory practice in which both are implicated, contribution should be available to allocate to each its fair share of the underlying monetary liability. Recognition of this remedy creates no new liability or right of action, but merely allows apportionment of liability among all the parties intended by Congress to bear it.

Congress intended that the realistic threat of backpay liability would serve as the principal "spur or catalyst" for eliminating discrimination in employment. Permitting apportionment of liability will strengthen the deterrent effect of the prohibition against discrimination. Denial of contribution, by contrast, would virtually eliminate any practical incentive for unions to retreat from discriminatory wage scales that benefit favored groups of employees. It would permit unions to escape their statutory liability by inducing the victimized groups to seek compensation from employers alone.

Contribution will also promote even-handed application of laws that make both unions and employers liable for discriminatory acts. Denial of contribution would unfairly foist upon employers the full burden of compensating victims of discrimination for injuries for which unions are also responsible. In light of these principles and practicalities, the lower federal courts have allowed contribution in the overwhelming preponderance of employment discrimination cases.

Fears conjured up by unions that allowing contribution would cause problems in managing employment discrimination cases are unfounded. Contribution would not unduly complicate employment discrimination litigation, whether the claim is asserted in the suit brought by the injured employees or, as here, in a separate suit by the employer. The federal courts have ample tools to manage these cases, as they have already demonstrated.

Nor will contribution expose unions to unjust, staggering assessments. Contribution, after all, only allocates shares of liability that Congress has seen fit to impose. Moreover, in the typical collective bargaining relationship, the national union may be financially stronger than the employer with whom it is negotiating. The two unions involved in this case are large and financially secure, with multi-million dollar annual incomes. Since contribution is an equitable remedy, the federal courts possess the flexibility to tailor the remedy in any case in which a union's "fair share" of the liability might exceed its ability to pay. A blanket rule shielding unions entirely from the exposure created by Congress, therefore, would be unwarranted.

II

A. Northwest did not engage in "unreasonable delay" by awaiting the district court's ruling on the employees' claims against it before asserting a contribution claim

against the unions. Traditionally, a contribution claim has been asserted by a separate lawsuit after the party seeking contribution has actually paid a judgment in favor of the injured party, since the contribution claim technically does not arise until then. More recently, some courts have permitted assertion of a contingent claim for contribution by cross-claim or third-party claim in the main action. But the anticipatory assertion of a contingent claim has never been mandatory. A defendant may reasonably await at least the initial determination of his own liability before being required to begin litigation over the ultimate allocation of a part of that liability.

B. Nothing in Title VII requires an employer to implead the union immediately in the employees' underlying suit or to refer a contribution request to the EEOC for conciliation. No court has ever imposed either condition to the assertion of a contribution claim under Title VII. Conciliation under Title VII is purely permissive, even for the employees' underlying charge. Nothing more can be demanded from an employer who seeks to assert a federal common law right, not a claim under Title VII itself.

C. The decision by the *Laffey* plaintiffs not to file an EEOC charge against the unions is no bar to a separate contribution suit. The employer's contribution claim has an independent life that turns on the existence of common liability for an injury, even if, through lapse of time or other procedural default, the injured employees have lost their right to enforce that liability directly against a responsible party. A major purpose of contribution is to remove from plaintiffs the power to control the ultimate apportionment of liability if, as in this type of case, equity demands that other parties responsible for the injury share the liability that is assessed.

ARGUMENT

I. AN EMPLOYER SHOULD BE ALLOWED TO OBTAIN CONTRIBUTION FROM A UNION FOR LIABILITY BASED ON A VIOLATION OF THE FEDERAL EMPLOYMENT DISCRIMINATION LAWS WHEN BOTH THE EMPLOYER AND THE UNION ARE RESPONSIBLE FOR THE DISCRIMINATORY PRACTICE.

It is important to place in perspective what this case involves and what it does not. Northwest is not inviting the Court to create any financial liability for unions beyond the liability to which Congress has already subjected them. Nor is this a case that requires the creation of implied rights of action to enforce federal statutes. Those rights already exist under the terms of the statutes and under other related doctrines. The simple issue is whether the Court agrees, as most lower courts have, that the developing law of remedies warrants recognition of a claim for equitable contribution among parties who already share legal and factual responsibility for a violation of federal employment discrimination laws.

A. The Federal Courts Have Joined State Courts In Recognizing The Equitable Propriety of Contribution.

Contribution is an equitable remedy that permits the apportionment of an injured party's recovery among all the persons who are legally responsible for the injury, even when the injured party has not sued or obtained a judgment against all of them. *Restatement (Second), Torts* § 886A(1) (1979). The rationale for contribution is grounded in fairness. It is inherently unjust in most circumstances to single out one party to bear the entire burden of liability when others are also responsible for causing the harm, perhaps more responsible. The original common law rule placed the entire burden of compensation for a jointly caused injury on whomever the

plaintiff happened to sue. As Justice Brennan observed, writing for the New Jersey Supreme Court in 1954, the "harshness of the rule" exposed it to "vigorous denunciation" because of its "obvious lack of sense and justice . . . ." *Judson v. Peoples Bank & Trust Co.*, 17 N.J. 67, 88, 110 A.2d 24, 34 (1954). *See, e.g.*, Prosser, *Law of Torts* § 50, at 307 (4th ed. 1971).

Recognizing this principle, courts today generally allow contribution under a variety of circumstances. Over the last five decades, 41 states and the District of Columbia have rejected the common law rule and have adopted contribution as a general principle of the law of remedies. The new *Torts Restatement* declares that contribution is now the prevailing American rule. *See* § 886A.[4]

The federal courts, of course, have the power in federal cases to replace an "ancient rule of common law" with "present day standards of wisdom and justice." *Funk v. United States*, 290 U.S. 371, 382 (1933). This Court has time and again recognized the power of the federal judiciary to supplement express remedies in order to advance the purposes of the underlying federal law.[5]

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[4] Appendix A lists the states that now recognize the right of contribution as a general principle of law.

For other expressions of the steady march of contribution, *see, e.g., Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 718 (2d Cir. 1978) (Friendly, J.); *Globus, Inc. v. Law Research Service, Inc.*, 318 F. Supp. 955, 957-58 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971); *Restatement (Second), Torts* § 886A, comment a, at 338. *See also* ABA Section of Antitrust Law, *Report on a Proposed Amendment of the Clayton Act to Permit Contribution* (1979), *in* 936 Antitrust & Trade Reg. Rep. (BNA) E-1 (October 25, 1979).

[5] *E.g., Illinois v. Milwaukee*, 406 U.S. 91 (1972); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967); *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960); *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957); *see also Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969).

Implementing this power, this Court and the lower federal courts have permitted contribution among persons who share potential liability for the same injury, so long as equitable apportionment is consistent with the federal law creating the underlying liability. *See, e.g., Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974); *Glus v. G. C. Murphy Co.*, 23 F.E.P. Cas. 86 (3d Cir. 1980) (Higginbotham, J.).

Although contribution is an equitable remedy, it is not limited to apportionment of liability for an underlying claim founded in equity. Nevertheless, the judicial power to recognize contribution must be at its zenith where the underlying claim is itself equitable, as is a claim for backpay under Title VII, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975); *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 718-19 (1978), and where Congress has assigned "plenary" remedial powers to implement the statutes to the federal courts. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974).

The accepted principles of contribution require only two elements: (1) that wrongdoers have common liability to the injured party, and (2) that the party seeking contribution would otherwise pay more than his fair share. *See* Prosser, *Law of Torts* § 50 (4th ed. 1971). These were the principles applied in this Court's leading case on contribution, *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc., supra*, 417 U.S. 106. There, in permitting a ship owner to obtain contribution against another tortfeasor responsible for a longshoreman's injuries, the Court explained that allowing contribution would produce a "more equal distribution of justice" than a no-contribution rule, *id.* at 111. In addition, this Court emphasized that contribution would advance the important interest of safety inherent in federal admiralty law, since apportioning an equitable share of damages among all parties at fault would encourage all parties to exercise care.

Outside the admiralty context, this Court has approved contribution unless the wrongdoer from whom contribution is sought was, for some special reason, never subject to liability for the amounts claimed. *Compare, e.g., United States v. Yellow Cab Co.*, 340 U.S. 543 (1951) (contribution allowed against United States when potentially liable to original plaintiff under Federal Tort Claims Act), *with Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977) (indemnity claim against government not allowed where sovereign immunity would have barred suit by original plaintiff).[6]

In the lower federal courts, contribution among all parties who are legally responsible for the injury has been routinely permitted in a variety of contexts.[7] Federal law

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[6] In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), the Court refused to allow contribution where the would-be contributor's liability to the injured party had been abrogated and replaced by a workman's compensation insurance system. The traditional rule under state law is that responsibility for workman's compensation does not constitute common liability for purposes of contribution. *E.g., Bertone v. Turco Products, Inc.*, 252 F.2d 726 (3d Cir. 1958)(New Jersey law); *Mahone v. McGraw-Edison Co.*, 281 F. Supp. 582 (E.D. Va. 1968)(Virginia law); *Iowa Power & Light Co. v. Abild Constr. Co.*, 259 Iowa 314, 144 N.W.2d 303 (1966); *Hunsucker v. High Point Bending & Chair Co.*, 237 N.C. 559, 75 S.E.2d 768 (1953).

The opinion in *Cooper Stevedoring, supra*, 417 U.S. at 112, explains the special facts that led to the disallowance of contribution in *Halcyon Lines*.

[7] For example, in *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975), the court held that a contribution right exists under federal common law in a case arising from a mid-air collision. The court fashioned such a rule because it is more just and because it fosters congressional intent and federal policies evidenced in the Federal Aviation Act, 49 U.S.C. §§ 1301 *et seq.*

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rarely grants special immunity to one of two parties who jointly inflict injury. Only in a few cases have the courts refused to allow apportionment of damages among all persons potentially liable for the harm, and those rare decisions have been based upon a clear interference with the policies of the law creating the underlying liability. For example, in the antitrust context, some courts have concluded that allowing contribution would defeat the deterrent effect of private actions to enforce the antitrust laws.[8] This issue is before the Court in *Westvaco Corp. v. Adams Extract Co.*, No. 79-972.

Whether or not that view of contribution is correct in the antitrust context, there is no collision between the equitable principle of contribution and the purposes of the federal employment discrimination laws. Not only will contribution not undermine the enforcement of the underlying laws, it will actually promote compliance with the command to eradicate employment discrimination. Accordingly, the general rule favoring contribution should be applied here.

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Other federal courts have fashioned contribution remedies in other contexts as well. *See, e.g., Heizer Corp. v. Ross*, 601 F.2d 330 (7th Cir. 1979); *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir. 1968); *George's Radio, Inc. v. Capital Transit Co.*, 126 F.2d 219 (D.C. Cir. 1942); *Wassel v. Eglowsky*, 399 F. Supp. 1330 (D. Md. 1975), *aff'd*, 542 F.2d 1235 (4th Cir. 1976); *Gould v. American-Hawaiian Steamship Co.*, 387 F. Supp. 163 (D. Del. 1974), *vacated and remanded on other grounds*, 535 F.2d 761 (3d Cir. 1976); *Globus, Inc. v. Law Research Service, Inc., supra*, 318 F. Supp. 955.

[8] *E.g., Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*, 604 F.2d 897, 902-03 (5th Cir. 1979), *petition for cert. pending sub nom. Texas Industries, Inc. v. Radcliff Materials, Inc.*, No. 79-1144 (filed Jan. 24, 1980) (48 U.S.L.W. 3570). *Contra, Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979) (allowing antitrust contribution because of contrary conclusion).

B. Contribution Should Be Permitted From Unions Under The Federal Employment Discrimination Laws.

The federal employment discrimination laws impose duties on both employers and unions, and both employers and unions bear monetary liability for breach of those duties. Since a labor union that participates in a violation of the federal employment discrimination laws bears liability for that conduct, the general rule favoring contribution should apply. An employer like Northwest that alone is sued for a joint employment practice should be allowed to seek from the union its fair share of the recovery obtained by the injured employees.

We first discuss the fundamental predicate for contribution: the existence of independent union liability for conduct violating Title VII and the Equal Pay Act, the two statutes that were the basis for imposing backpay liability upon Northwest in the *Laffey* case. Then we explain why contribution will measurably promote the objectives of those statutes.

1. Unions bear equal responsibility for Title VII violations.

Title VII expressly makes it unlawful for a union to engage in discriminatory practices, including activity to "cause or attempt to cause an employer to discriminate" on the basis of race, sex, religion or national origin. Section 703(c)(3), 42 U.S.C. § 2000e-2(c)(3). A victim of union-caused or union-assisted discrimination may bring an action against the union. Section 706(f), 42 U.S.C. § 2000e-5(f). The court in a Title VII action may "order . . . back pay (payable by the employer . . . *or labor organization*, as the case may be, responsible for the unlawful employment practice) . . . ." Section 706(g), 42 U.S.C. § 2000e-5(g) (emphasis added).

Nor was the imposition of liability on unions for causing or joining Title VII violations a mere after-

thought. As this Court has noted, Congress modeled the backpay provisions of Title VII on Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 106(c). *See Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 419. Backpay awards against unions under Section 10(c) had been a basic feature of federal labor relations law for many years by the time Title VII was crafted.[9]

The legislative history of Title VII shows that Congress recognized the critical importance of placing unions under an independent and meaningful duty to combat discrimination. Their failure to honor this independent duty was meant to subject unions to precisely the same monetary sanctions that are applicable to employers.[10]

Congress enacted the union liability provision of Title VII against the backdrop of three years of hearings that presented a consistent theme that unions themselves discriminate and contribute significantly to discrimination by employers.[11] In those hearings, Congress

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[9] *See, e.g., Radio Officers v. NLRB*, 347 U.S. 17 (1954); *NLRB v. Gottfried Baking Co.*, 210 F.2d 772 (2d Cir. 1954) (to award backpay against union under § 10(c) of the NLRA, it is sufficient that union signed unlawful collective bargaining agreement); *NLRB v. Alaska S.S. Co.*, 211 F.2d 357 (9th Cir. 1954) (same).

See In re Newman, 85 N.L.R.B. 725 (1949) (announcing rule of joint and several backpay liability for unions and employers). The rule was upheld in *Union Starch & Ref. Co. v. NLRB*, 186 F.2d 1008, 1014 (7th Cir.), *cert. denied*, 342 U.S. 815 (1951).

[10] *See, e.g.*, H.R. Rep. No. 914, 88th Cong., 1st Sess. 29 (1963); 110 Cong. Rec. 13169, 13170-13171 (1964) (remarks of Sen. Byrd); *id.* at 7207, 7209 (Justice Department memorandum introduced by Sen. Clark).

[11] *See, e.g., Hearings on Proposed Federal Legislation to Prohibit Discrimination in Employment Before the Special Subcomm. on Labor of the House Education & Labor Comm.*, Part 1, 87th Cong., 1st Sess. (1961) (hereafter "*Powell Committee Hearings, Pt. 1*"); *Hearings on Proposed Federal Legislation to Prohibit Discrimination in Employment Before the Special Subcomm.*

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heard extensive testimony about "widespread" union discrimination.[12] Union culpability was exposed by civil rights leaders like Herbert Hill and A. Philip Randolph and confirmed by nationally prominent labor leaders like George Meany and Walter Reuther, who readily admitted union discrimination.[13] Those labor leaders recognized that

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on Labor of the House Education & Labor Comm., Part 2, 87th Cong., 2d Sess. (1962) (hereafter "*Powell Committee Hearings, Pt. 2*"); *Hearings on H.R. 405 and Similar Bills to Prohibit Discrimination in Employment Before the General Subcomm. on Labor of the House Education & Labor Comm.*, 88th Cong., 1st Sess. (1963) (hereafter "*H.R. 405 Hearings*"); *Hearings on Civil Rights Before Subcomm. No. 5 of the House Judiciary Comm.*, Serial No. 4, 88th Cong., 1st Sess. (1963) (hereafter "*Judiciary Hearings*").

[12] H.R. Rep. No. 570, 88th Cong., 1st Sess. 2 (1963).

[13] *See, e.g., Powell Committee Hearings, Pt. 2*, at 719-37, where Herbert Hill, Labor Secretary of the NAACP, explained how organized labor often "enters into collusive practices with management to codify discriminatory employment practices into collective bargaining agreements." *See also H.R. 405 Hearings*, at 144-47. Similar observations were made by Rev. Richard Hillenbrand of the New York City NAACP. *H.R. 405 Hearings* at 27-30.

Powell Committee Hearings, Pt. 2, at 798-801 (Regional NAACP Director Clarence Laws: one of the "four main forces in the United States which mitigate against minority groups enjoying equal and fair opportunity at employment" is "discrimination by labor unions"); *H.R. 405 Hearings* at 408-09 (D.C. Advisory Committee to the U.S. Comm'n on Civil Rights: "discriminatory practices of local unions are as pernicious a barrier to Negro employment as are the practices of employers").

Powell Committee Hearings, Pt. 2, at 851-53 (A. Philip Randolph, National President of the Negro American Labor Council); *id.* at 993, 1002-05 (George Meany, President of the AFL-CIO); *id.* at 1009-10 (IUE Int'l Secretary-Treasurer Hartnett); *Judiciary Hearings*, at 1791 (Meany); *id.* at 2060 (Teamsters Legislative Counsel Zagri); *id.* at 1944 (UAW President Reuther).

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"the labor movement has failed to measure up to its responsibility" to end discrimination,[14] and that often "discrimination is jointly perpetrated and perpetuated by unions and employers." *H.R. 405 Hearings*, at 66 (IUE President Carey). Indeed, representatives of labor *insisted* that, in order to be effective, an employment discrimination law had to contain strong sanctions that would apply equally to unions as well as employers. As Walter Reuther stated to the House Judiciary Committee, "if a union discriminates, there ought to be a penalty. . . . and the penalty is the thing that will facilitate and accelerate progress." *Judiciary Hearings*, at 1944.[15]

The product of this testimony was the ban on union-caused discrimination in Section 703(c)(3) and the imposition of union backpay liability under Section 706(f) and

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Powell Committee Hearings, Pt. 1, at 158 (Report of the U.S. Commission on Civil Rights); *id.* at 165 (UAW Vice President Greathouse); *see* numerous similar statements by other labor leaders, *id.* at 214-18, 392, 658, and by Congressmen, *id.* at 164, 221, 504; *H.R. 405 Hearings* at 21.

[14] *Powell Committee Hearings, Pt. 1*, at 214 (Trade Union Leadership Council Vice President Sheffield); *see also id.* at 240 (Chicago Chapter, Negro-American Labor Council Secretary-Treasurer Abner).

[15] *See Powell Committee Hearings, Pt. 2*, at 1002 (George Meany: legislation will be effective only if it has enough "teeth" in it); *id.* at 1009-10 (statement of IUE Secretary-Treasurer Hartnett: there must be strong "impartial" enforcement and stringent penalties "for any violator, be he management, labor, or anything else"); *Judiciary Hearings*, at 1791-94 (George Meany: "the guilty employer should be punished to the same extent as the guilty union"); *H.R. 405 Hearings*, at 66-72 (IUE President Carey: the law should apply to unions as well as employers). *See also Powell Committee Hearings, Pt. 1*, at 651 (New York State Assistant Attorney General Siegel: one reason for ineffectiveness of New York fair employment law was "relative immunity of the unions").

(g). Pressing the congressional attack upon union-caused or union-aided discrimination, the federal courts have held unions liable for backpay under Title VII even for a relatively passive role in signing or administering collective bargaining agreements that cause unlawful discrimination. Union backpay liability has been even more clear where, as in this case, the unions were instrumental in the negotiation and perpetuation of the offending contract provision.[16]

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[16] The most recent commentary on this issue concludes that, "regardless of its precontract negotiating efforts, a union violates Title VII when it signs a collective bargaining agreement which discriminates in operation." Note, *Union Liability For Employer Discrimination*, 93 Harv. L. Rev. 702 (1980) (hereafter "*Union Liability*").

See, e.g., Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1389 (5th Cir. 1978), *cert. denied*, 441 U.S. 968 (1979); *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1300 (8th Cir. 1978); *Denicola v. G. C. Murphy Co.*, 562 F.2d 889, 892 (3d Cir. 1977) (sex discrimination in contract wage rates); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 270-71 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); *Sears v. Atchison, T. & S. F. Ry.*, 454 F. Supp. 158, 180 (D. Kan. 1978); *Farmer v. Hotel Workers Local 1064*, 19 E.P.D. ¶9075, 99 L.R.R.M. 2166 (E.D. Mich. 1979). (job classification and wage scales that discriminated against women); *Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252, 260-61 (N.D. Ind. 1977) (sexually discriminatory contract language); *Dickerson v. United States Steel Corp.*, 439 F. Supp. 55, 62-63, 80 (E.D. Pa. 1977), *additional opinion*, 472 F. Supp. 1304 (E.D. Pa. 1978), *vacated and remanded on other grounds*, 616 F.2d 698 (3d Cir. 1980); *Stevenson v. International Paper Co.*, 432 F. Supp. 390, 398 (W.D. La. 1977).

See generally Schlei & Grossman, *Employment Discrimination Law* 560 (1976). *Cf. Restatement (Second), Torts* § 876, comment b & illustration 4, § 879 & comment a (one who encourages or assists another to commit a tort, is himself a tortfeasor and responsible for the consequences of the other's acts).

Under these principles, both TWU and ALPA are subject to backpay liability for the allegedly discriminatory pay differential that they regularly "demanded" and that was "an integral part of the collective bargaining negotiations and of all contracts entered into and implemented" between Northwest and the unions (JA 17, ¶6). There is no doubt, therefore, that Northwest has satisfied the basic predicate of a claim for contribution of a part of the Title VII backpay award in *Laffey*.

2. Unions are subject to independent monetary liability for causing violations of the Equal Pay Act.

A similar result follows for an employer's liability under the Equal Pay Act when a union violates its own statutory duty under that Act not to cause the employer to pay unequal wages for equal work. Since the union would bear monetary liability for its breach if sued, it must respond in contribution if only the employer is sued.

The Equal Pay Act is addressed specifically to wage discrimination "on the basis of sex." 29 U.S.C. § 206(d)(1). Like Title VII, the Equal Pay Act prohibitions apply equally to employers and unions. Under § 206(d)(2), it is unlawful for any "labor organization" to "cause or attempt to cause" an employer "to discriminate against an employee" on the basis of sex by paying unequal wages for equal work.

The court below, in denying contribution for Equal Pay Act liability, focused on only one feature of the Equal Pay Act, which the court thought dispositive: the apparent absence of an express right under that statute for injured employees to recover backpay from unions violating the Act. That "omission," the court of appeals concluded, "insulates unions from suits by employees." The court then reasoned that what it viewed as a "statutory protection" of unions would be frustrated by allowing contribution (Pet. App. 9d). That analysis suffers from two fundamental flaws.

First, the Equal Pay Act itself expresses no purpose to give unions "statutory protection" from monetary liability. The Act expressly subjects unions to backpay suits by the government on behalf of the deprived employees. In addition, the legislative history of the Act convincingly demonstrates that Congress assumed that there would be effective damage remedies by employees against unions for union-caused violations.

Second, entirely apart from the remedies under the Equal Pay Act itself, separate elements of federal employment discrimination law unequivocally impose monetary liability on unions that cause wage discrimination on the basis of sex in violation of that Act. That common liability for an injury—even if the remedy is supplied by a different statute or separate legal doctrine—is a sufficent predicate for an employer's claim for contribution for a portion of the liability imposed on it under the Equal Pay Act.

(a) Union liability directly under the Act.

When Congress made it unlawful for a union to cause an employer to engage in sex-based wage discrimination in violation of the Equal Pay Act, Congress intended to make "labor unions accountable and responsible for their part" in wage discrimination against women. 108 Cong. Rec. 14751 (1962) (Rep. Griffin). This accountability includes full financial liability.

1. The Act expressly makes unions subject to monetary liability for discriminatory wage scales that they procure. Congress provided explicitly for suits by the Secretary of Labor that would cover unions as well as employers. 29 U.S.C. §§ 216(c), 206(d)(3). *See also* Reorganization Plan No. 1 of 1978, § 1, 43 Fed. Reg. 19807 (1978) (transferring Equal Pay Act enforcement to the EEOC). These suits are brought "on behalf of" the injured employees, and any recovery obtained "shall be paid . . . directly to the employee or employees affected."

The government has successfully invoked this authority to recover damages from a union that violated the Equal Pay Act, and has convinced the lower courts in the context of Section 216(c) actions that unions and employers are "jointly and severally liable" for backpay under this Act. *Hodgson v. Sagner, Inc.*, 326 F. Supp. 371, 374 (D. Md. 1971), *aff'd*, 462 F.2d 180 (4th Cir. 1972); *see Dunlop v. Beloit College*, 411 F. Supp. 398, 402 (W.D. Wis. 1976). Even the court below agreed that unions are liable for backpay in suits brought by the government under the Equal Pay Act (Pet. App. 7d, 9d, 11d). This express liability destroys any contention that Congress intended unions to enjoy a special immunity from the consequences of their own violations of the Act.

2. Moreover, although the Act as ultimately passed in 1963 contained no section explicitly providing for injured employees to sue unions for violating the Act, this omission does not manifest any congressional purpose to absolve unions of monetary liability. As the United States and the EEOC stated in their *amici* brief to this Court at the petition stage:

> "There is much to suggest that Congress intended that unions would be covered by the [Equal] Pay Act and held accountable under it in the same manner and to the same extent as employers." Brief for the United States and the EEOC as Amici Curiae, p. 7.

That is an understatement. The legislative history of the Equal Pay Act persuasively demonstrates that Congress believed the courts would require unions to shoulder equal financial responsibility for their violations. It is worth recalling that the Act was passed at a time when, as Congress understood, there was a judicial willingness "to provide such remedies as are necessary to make effective the congressional purpose." *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). *See Cannon v. University of Chicago*, 441

U.S. 677, 696-700 (1979). At that time Congress "tended to rely to a large extent on the courts" to infer the pertinent remedies. *Id.* at 718 (Rehnquist, J., concurring).

Congressional intent to allow employees to sue unions for violating the Equal Pay Act emerges unmistakably from the legislative history. The forerunner of the Act that was passed in 1963 was a 1962 "equal pay" bill, H.R. 11677, that passed the House but was not reconciled with a substantially identical Senate-passed bill prior to expiration of that Congress. H.R. 11677 had been amended on the House floor expressly to prohibit unions from causing sex-based wage discrimination. The principal advocate of the amendment explained that it was critical to treat unions equally with employers because "labor organizations . . . are often directly involved in creating the conditions or situations which are discriminatory." 108 Cong. Rec. 14752 (1962) (Rep. Griffin). Representative Zelenko, who offered the amendment to cover unions, added:

> "[T]here is included in the bill a prohibition against the labor unions or organizations that might attempt to coerce or influence or bargain an employer to violate the provisions of this act. *Up to this point, it was the employer that was liable.* But it is thought that, perhaps, in his bargaining activities between labor management and unions, there might come a point where because of the insistence of a labor union, he might be obliged to violate the law as it applies to discrimination regarding the sexes.
>
> ". . .[O]*rganized labor is* in favor of this amendment. They are willing to be placed in this bill and *to be subject to its penalties*, if they are involved in any violation." 108 Cong. Rec. 14766-67 (1962) (emphasis added).

Under the 1962 bill, enforcement would have been assigned exclusively to the Secretary of Labor, who was to be authorized to sue in federal court to have monetary liability assessed against *any* "respondent," a term that was defined to include unions as well as employers. *See* H.R. 11677, 87th Cong., 2d Sess., §§ 4, 6(a), (d) (as passed by the House, July 25, 1962). Thus, no one doubted that unions were to be subject to precisely the same financial liability as were employers.

When an equal pay bill was presented again in 1963, it differed from its predecessor in one respect. The bill's provisions were to be merged into the Fair Labor Standards Act. This was done solely to allay concern that the exclusive government enforcement mechanisms of the 1962 bill would necessarily have created a "new bureaucracy . . . with a new set of investigators and a new set of rules." 109 Cong. Rec. 7223 (1963) (Rep. Thompson). As Representative Frances P. Bolton explained regarding the changes in the 1963 bill:

> "It is a very logical approach to the problem in that it places administration of equal pay under the Fair Labor Standards Act. This alleviates the fear voiced by many that passage of such a bill would lead to the establishment of a new bureaucracy with a new set of rules and a new set of investigators." 109 Cong. Rec. 9193 (1963).

Insertion of the new Act into the FLSA, by contrast, opened up *private* enforcement as well.

By merging the Equal Pay Act provisions into the FLSA, therefore, Congress did not intend to alter the uniform treatment of employers and unions that had been carefully crafted as part of the 1962 bill. As the FLSA stood prior to the insertion of the Equal Pay Act, it addressed only illegal acts by employers, like minimum wage and maximum hour violations, and thus it provided

only for suits against employers. Congress, however, assumed that, when the new Equal Pay Act merged into the FLSA, with a new prohibition against union misconduct, unions as well as employers would become subject equally to all the remedies that had been available to aggrieved employees under the FLSA.

For instance, Representative O'Hara, a member of the subcommittee that had drafted the final bill, stressed that

> "if a labor organization is in any way at fault in maintaining such a discriminatory wage rate, they would be subject to *all the penalties and all the enforcement provisions* provided under the Fair Labor Standards Act." 109 Cong. Rec. 9209 (1963) (emphasis added).

The "penalties and enforcement provisions" include, of course, an employee suit for back wages. 29 U.S.C. § 216(b). Similarly, Representative Thompson declared unequivocally that discrimination made unlawful by the Act could subject "the guilty party"—not just an employer—to liability in a suit by the government or one "*initiated by the employee or the employer* in a Federal district court." 109 Cong. Rec. 9197 (1963) (emphasis added).

These expressions leave no room to believe that Congress intended to insulate unions from monetary liability for causing sex-based wage discrimination. The absence of an explicit authorization for suits by injured victims of union-caused discrimination is no barrier to the recognition of a remedy that was clearly intended. As the Court has recently remarked, the touchstone is always congressional intent, and the intent to allow a private remedy "may appear implicitly in the language of the statute or in the circumstances of its enactment." *Transamerica*

Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979). That implication is surely not obscure here.[17]

Moreover, it bears emphasis that the Equal Pay Act is a civil rights statute, thus providing the context in which "not only the words and history" of the Act, but also "its

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[17] Despite the persuasive legislative history and its own prior position, the government suggested at the petition stage that unions may not "fit" into the enforcement scheme of the FLSA. The government noted that wage differentials violating the Equal Pay Act are deemed to constitute "unpaid minimum wages" under the FLSA. From this definition, the government suggested that perhaps only employers "benefit financially" from a violation and that only enforcement against employers was contemplated.

This suggestion stands the legislative history on its head and was expressly rejected—at the government's instance—in *Hodgson v. Sagner, Inc., supra*, 326 F. Supp. at 373. By including sex-based wage differentials as unpaid wages, Congress was simply adopting an expedient device to allow Equal Pay Act enforcement to ride the coattails of FLSA enforcement, not redefining the entire purpose of the Equal Pay Act. Indeed, the EEOC recently urged and obtained rejection of a similar argument by respondent ALPA against union backpay liability under the Age Discrimination in Employment Act, which also picks up FLSA remedies and treats back wages recoverable from unions as "unpaid minimum wages", 29 U.S.C. § 626(b). *EEOC v. Air Line Pilots Ass'n*, 489 F. Supp. 1003 (D. Minn. 1980).

As Congress recognized, it is simply not true that only employers "benefit financially" from unlawful discrimination. As discussed below (pp. 36-37), unions may have an independent incentive to press for unlawful wage differentials, to the advantage of employees of one sex at the expense of employees of the other.

It is important to recall that, a year after passing the Equal Pay Act, the same Congress enacted the Civil Rights Act of 1964, which expressly makes unions liable for "backpay" for causing Title VII violations.

subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination." *Cannon v. University of Chicago, supra*, 441 U.S. at 709.[18] Therefore, employees' suits against unions alleging that the unions caused sex discrimination in wages have a firm foundation in the Equal Pay Act. As the Fifth Circuit explained in entertaining such a suit:

> "[L]abor unions must bear a heavy responsibility in giving effect to the remedial provisions of both Title VII *and the Equal Pay Act.* International unions, along with regional and local unions, *may incur liability for discriminatory effects of contract provisions found in collective bargaining agreements." Sinyard v. Foote & Davies Div. of McCall Corp.*, 577 F.2d 943, 945 (5th Cir. 1978)(emphasis added).[19]

3. Unions, therefore, are exposed to financial liability for violating the Equal Pay Act. Regardless of the identity of the instrument of enforcement of the union's liability to deprived employees, the union's exposure to monetary liability for causing an Equal Pay Act violation establishes the predicate for a contribution claim if only

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[18] *See generally* Note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View*, 87 Yale L. J. 1378 (1978). Those lower courts that have suggested a contrary conclusion have failed to come to grips with the legislative purpose and history of the Equal Pay Act. *See, e.g., Denicola v. G. C. Murphy Co., supra*, 562 F.2d 889; *Brennan v. Emerald Renovators, Inc.*, 410 F. Supp. 1057 (S.D.N.Y. 1975).

[19] *See also Murphy v. Miller Brewing Co.*, 307 F. Supp. 829, 839 (E.D. Wis. 1969), *aff'd sub nom. Hodgson v. Miller Brewing Co.*, 457 F.2d 221 (7th Cir. 1972), an Equal Pay Act backpay case in which the employer impleaded the unions. The court dismissed the third-party complaint against the unions, but only because the unions had not violated the Act since they had never "proposed the discriminatory provisions" and instead had pressed for wage equalization. Under such a test, TWU and ALPA would have certainly been liable if the stewardesses had sued them directly under the Act.

the employer is sued. Thus, even if the Equal Pay Act stood alone, there would be ample basis—entirely apart from the rest of federal employment discrimination law—for an employer to seek contribution against a union.

(b) Union liability under other doctrines.

Furthermore, in supporting a claim for contribution for injury inflicted by violation of the Equal Pay Act, it is unnecessary to rely solely on the remedies that the Equal Pay Act itself supplies. Rather, the existence of backpay remedies enforceable under other doctrines of federal law for union conduct that causes injury in violation of the Equal Pay Act provides ample basis for an employer's contribution claim. This conclusion follows from the settled principle, recognized in both federal and state law, that "a right of contribution rests upon the common liability of the wrongdoers for the loss notwithstanding the fact that the liability of each wrongdoer may rest on a *different* ground."[20]

Two other sources of federal employment discrimination law create private backpay remedies against unions for conduct that violates the Equal Pay Act. One is Title VII, which comprehends all forms of conduct that violate the Equal Pay Act. The other is the federal common law doctrine making a union liable for damages for breach of its duty of fair representation, a duty that is

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[20] *Fischbach & Moore International Corp. v. Crane Barge R-14*, 476 F. Supp. 282, 287 (D. Md. 1979) (emphasis added); *accord, e.g., Guillard v. Niagara Machine & Tool Works*, 488 F.2d 20, 22 (8th Cir. 1973); *Hartford Accident & Indemnity Co. v. R. Herschel Mfg. Co.*, 453 F. Supp. 1375, 1379 (D.N.D. 1978); *City of Kingsport v. SCM Corp.*, 429 F. Supp. 96, 100 (E.D. Tenn. 1976); *Cartel Capital Corp. v. Fireco of New Jersey*, 81 N.J. 548, 410 A.2d 674 (1980); *Bundy v. City of New York*, 23 App. Div. 2d 392, 261 N.Y.S.2d 221 (1965).

contravened when a union violates its statutory duty under Section 206(d)(2) and causes an employer to maintain a discriminatory wage scale prohibited by the Equal Pay Act.

1. Closely tracking the terms of the Equal Pay Act, the prohibition applicable to labor unions under Title VII forbids a union "to cause or attempt to cause an employer to discriminate against an individual" in compensation. Section 703(c)(3), 42 U.S.C. § 2000e-2(c)(3). Although the coverage of the Equal Pay Act is somewhat narrower than that of Title VII, the basic purpose of both is the same:

> "Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry . . . ." *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).

Both statutes "serve the same fundamental purpose against discrimination based on sex." *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 266 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).

Indeed, Congress went to unusual lengths to harmonize the two acts, providing in the so-called Bennett Amendment, Section 703(h), 42 U.S.C. § 2000e-2(h), that Title VII's coverage of sex discrimination in wages is to be precisely the same as under the Equal Pay Act. *See* 110 Cong. Rec. 13647 (1964)(remarks of Sen. Bennett). As Senator Bennett later explained, his "amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act." 111 Cong. Rec. 13359 (1965). In applying this legislative congruence, the federal courts have consistently held that the sex discrimination provisions of the two acts "are *in pari materia*" and that any Equal Pay Act violation also transgresses Title VII. *Schultz v. Wheaton Glass Co., supra*, 421 F.2d at 266; *accord, Laffey v. North-*

west Airlines, Inc., supra, 567 F.2d at 445-46; *Ammons v. Zia Co.*, 448 F.2d 117, 119 (10th Cir. 1971).

Thus, a union that violates the Equal Pay Act is necessarily subject to the overlapping remedies available against it under Title VII, including the explicit provision for backpay awards against unions. This exposure provides a legitimate basis for a court of equity to require the union to absorb its fair share of any award against the employer, even if the award is separately calculated under the Equal Pay Act.[21]

Under this principle, the union bears only the proportionate consequences of its own violation of the Equal Pay Act. Any other rule would create an absurd anomaly: Contribution would depend solely upon the particular anti-discrimination statute pleaded by the plaintiff. The very purpose of contribution, however, is to avoid having the ultimate allocation of liability turn entirely upon the plaintiff's choice.

2. Moreover, there is still another base on which to rest the monetary liability of unions that promote discriminatory wage scales. When a union like TWU or ALPA encourages or endorses contractual wage levels that are found to be sexually discriminatory, the union necessarily has engaged in an actionable breach of its federal common law duty of fair representation.

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[21] While the two statutes contain different procedures for pressing claims, the substantive terms establishing the underlying violation are identical. *See generally Zontelli Brothers v. Northern Pacific Ry.*, 263 F.2d 194, 197-99 (8th Cir. 1959) (differences in extent of liability and effect of contributory negligence between the Minnesota wrongful death statute and the Federal Employers Liability Act do not preclude a right of contribution between parties subject to liability under those acts).

The principle of contribution only requires that both defendants *could* have been held liable to the same plaintiff for the same injury; it does not require that the plaintiff actually press or perfect a claim against both.

Because of its position as sole representative of all employees in the bargaining unit, a union has a duty to represent all employees fairly.[22] This principle was first recognized in the *Steele* case twenty years before the passage of the Equal Pay Act. In that case, in which black workers sued a union alleging that it was discriminating against them, the Court declared that a union like TWU and ALPA, certified as exclusive bargaining representative under the Railway Labor Act, 45 U.S.C. §§ 152, 181, owes "the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts," without discriminating against any group of employees, 323 U.S. at 202-03, and must respond in damages for breach of that duty.

Can there be any doubt that a union's violation of the Equal Pay Act breaches its duty of fair representation? The lower federal courts have had little difficulty in recognizing that complicity in sex discrimination constitutes an equally actionable abuse of exclusive bargaining status. On many occasions, the courts have ruled that a union breaches its duty of fair representation by negotiating contracts that discriminate on the basis of sex.[23]

In the *Hotel Workers* case, *supra*, for example, the employer was initially responsible for relegating women workers to lower paying job classifications, even though

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[22] *See International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 47 (1979); *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38 (1953); *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 198-199 (1944). *See generally* Schlei & Grossman, *Employment Discrimination Law* 641-55 (1976).

[23] *E.g., Farmer v. Hotel Workers Local 1064, supra*, 19 E.P.D. at 6631-32; *Chrapliwy v. Uniroyal, Inc., supra*, 458 F. Supp. at 282; *Glus v. G. C. Murphy Co.*, 329 F. Supp. 563, 567-68 (W.D. Pa. 1971).

their duties were similar to those of the men. The union was found to have breached its duty of fair representation in continuing to negotiate for larger increases for the men than for the women. 19 E.P.D. at 6631-32. Similarly, in *Uniroyal, supra*, the district court referred to the Equal Pay Act's standard for what constitutes "equal work" in deciding that the union had breached its duty of fair representation by agreeing to a contract that maintained discriminatory wage rates. 458 F. Supp. at 282. Those breaches precisely parallel the actions of TWU and ALPA here in urging and embracing the purser pay differential.

A union that violates the duty of fair representation can be held liable for damages, including lost wages, resulting from its wrongful acts. *See, e.g., International Brotherhood of Electrical Workers v. Foust, supra*, 442 U.S. at 48-49. Where a union's breach of its duty of fair representation results from its "negotiation of arbitrary and discriminatory contractual provisions," and when union and employer are sued together, then "the union may be held jointly and severally liable with the company or its liability for damages may be apportioned to the extent that it shares responsibility for the whole of such damage."[24] This Court itself has recognized that an employer and a union may be concurrently liable for portions of the same injury, even though the remedy against the employer is founded directly on a statute and the union's liability flows from its breach of its duty of fair representation. *Czosek v. O'Mara*, 397 U.S. 25, 28-29 (1970).

Where, as here, there is concurrent liability—under the Equal Pay Act for the employer, and at least under the duty of fair representation for the unions—the basis for a

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[24] *Farmer v. Hotel Workers, supra*, 19 E.P.D. at 6633; *see Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 798 (2d Cir. 1974); *Petersen v. Rath Packing Co.*, 461 F.2d 312, 316 (8th Cir. 1972); *Richardson v. Communications Workers*, 443 F.2d 974, 982 (8th Cir. 1971), *cert. denied*, 414 U.S. 818 (1973).

claim for contribution exists if the employer alone has been sued. Contribution has been permitted on this basis when the underlying conduct of the employer violated Title VII.[25] Contribution should also be recognized when the backpay award against the employer is based on the Equal Pay Act. *See Wirtz v. Hayes Industries, Inc.*, 1 E.P.D. ¶9874 (N.D. Ohio 1968).

3. Allowing contribution will advance the policy of eliminating employment discrimination.

The predicates for contribution exist; the Court should uphold the right. The Court has recognized that Congress relied upon the prospect of backpay liability as the primary incentive to induce all the participants in the employment relationship, including unions, to strive to eliminate discrimination. As stated in *Albemarle Paper Co. v. Moody, supra*, it is only the "reasonably certain prospect of a backpay award" that serves as an adequate "spur or catalyst" to cause "employers *and unions*" to undertake the effort to "self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of employment discrimination. 422 U.S. at 417-18 (emphasis added).

Contribution assures that backpay liability will serve as the "spur or catalyst" that Congress intended. Because contribution apportions liability among all parties responsible for the discriminatory practice, recognition of contribution will insure that all parties involved face the "reasonably certain prospect" of backpay liability. Unless unions are exposed to claims for contribution, the practical wisdom of the congressional scheme as recognized by the Court will be largely pointless.

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[25] *Farmer v. Hotel Workers, supra*, 19 E.P.D. at 6631-32; *Communications Workers v. Illinois Bell Telephone Co.*, 12 E.P.D. ¶ 11,275, at 5907 (N.D. Ill. 1973); *see also Stevenson v. International Paper Co., supra*, 432 F. Supp. at 408.

The realistic prospect of backpay liability will force each participant in the collective bargaining process to exercise independent judgment in identifying and challenging discriminatory practices. As Judge Higginbotham concluded, writing for the Third Circuit just a few months ago in upholding an employer's claim for contribution against a union under Title VII, a "right of contribution would achieve this goal." *Glus v. G. C. Murphy Co., supra*, 23 F.E.P. Cas. at 91. Quoting with approval the opinion of the district court in the present case (Pet. App. 16b-17b), Judge Higginbotham explained:

> "Under a rule of contribution, '[b]oth union and employer will know that they must be vigilant to eschew unlawful discrimination and that the employee's predilection as to whom to sue will not insure either immunity from the mandates of the law.' *Northwest Airlines, Inc. v. Transport Workers Union* . . . ." 23 F.E.P. Cas. at 91.

A refusal to allow contribution, by contrast, would effectively destroy the "reasonably certain prospect" of backpay liability that Congress intended to create for both unions and employers. A no-contribution rule would permit an employee, by choosing to bring an action only against an employer, to "fasten liability on one party to a labor contract which was a substantial cause of the discriminatory employment practices and grant total immunity from such liability to the other party." *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1381 (5th Cir. 1974). That result hardly advances the congressional plan.

Unions more than employers would be the beneficiaries of such a rule. Union members will surely be reluctant to take on their own unions if they can avoid a direct confrontation. Under a no-contribution rule, a union that has participated in discrimination against a group of employees could effectively insulate itself from liability by persuading the injured employees to assert

their claims against the employer alone. The union could, for example, adopt empty rhetoric about abolishing discrimination in an effort to persuade the aggrieved employee that the employer alone was responsible for the discriminatory practices. Peer pressure, appeals to union loyalty, even coercive tactics may be the basis for inducing an employee not to sue the union. The consequences of a no-contribution rule, therefore, would be substantial insulation of unions from the liability that Congress has seen fit to impose upon them.

As the legislative history underlying both statutes shows, Congress appreciated the blunt fact that unions as well as employers cause employment discrimination and that they often have an independent motive to do so. As the Second Circuit noted in *EEOC v. Steamfitters Local 638*, 542 F.2d 579, 585 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977), "in many instances, it may well be that union, rather than employer, discrimination is the prime factor resulting in the evil proscribed under Title VII . . . ." For example, in the routine situation in which an employer is prepared to agree to a wage package of a certain total amount, it is the union that has the primary interest in how the wages are allocated among various jobs. The employer may gain nothing from a discriminatory wage scale, but a faction controlling the union's bargaining—white workers, for example, or men—may profit handsomely from the division they construct. Thus, in *Farmer v. Hotel Workers*, *supra*, 19 E.P.D. ¶9075, a union bargained for the exclusion of women from certain jobs, allowing it to gain advantages for the eligible men.[26]

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[26] *See also EEOC v. Air Line Pilots Ass'n*, *supra*, 489 F. Supp. 1003, which held that a contract provision proposed by respondent ALPA, and as to which Northwest as the employer was "neutral," violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a)(1). Northwest was held to have

(footnote continued on following page)

Although the locals of TWU and ALPA at Northwest were composed primarily of women, women generally constitute a minority within major unions and rarely have a strong role in union leadership.[27] Similarly, the role of blacks in American unions leaves them largely dependent on the vigor with which union leaders wish to press for equal employment opportunity. History shows that the interests of minority members "frequently diverge from those of the union leadership, especially on discrimination issues." *Union Liability, supra*, 93 Harv. L. Rev. at 707 n.25. Thus, if a claim for contribution were utterly barred, the natural reluctance of employees to sue their unions and the ability of unions to manipulate the victims of discrimination to sue their employers alone would license unions to discriminate with virtual impunity.

Furthermore, if unions were shielded from contribution claims by employers with whom they act in concert, unions would lack any effective incentive to identify and to work toward correcting discriminatory practices perpetuated through collective bargaining. As the Fifth

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(footnote continued from preceding page)

violated the ADEA because it "acquiesced in the pressures brought to bear by ALPA during negotiation" of the contract. Damages were equitably apportioned in accordance with the principle of proportionate fault, with greater damages assessed against ALPA.

[27] Women made up only 22% of union membership in 1976, the most recent year for which complete data are available. *See* U.S. Department of Labor, Bureau of Labor Statistics, *Directory of National Unions and Employee Associations 1977* at 64 (1979) (Bulletin No. 2044) (hereafter, "*BLS Union Directory*"). At that time, the "leadership of most unions did not reflect the sexual composition of the organizations' membership." *Id.* at 66-67. This is unlikely to be significantly different today. In 1976, although 22% of union rank-and-file membership was female, women comprised only 8% of the unions' governing boards. *Id.*

Circuit aptly stated when it recognized a right of contribution for Title VII liability in *Myers v. Gilman Paper Corp.*, *infra* note 28, 544 F.2d at 851-52:

> "Being jointly responsible for the creation and maintenance of this [discriminatory] system, [the unions] had an affirmative obligation to seek Title VII compliance. Had one of the unions, for example, forcefully brought Title VII's requirements to the company's and the other unions' attention, that might have provided the necessary stimulus for some or all of the other joint wrongdoers to end the violations."

These observations have pointed relevance to this case, where the two unions repeatedly pressed to preserve and enlarge the purser pay differential later held to be discriminatory. It is unthinkable that the pay differential would have persisted as long as it did if the unions had protested the differential as discriminatory, instead of coming to the bargaining table year after year urging that it be not only continued, but enlarged. One group of union members profited from this wage differential. If Northwest discriminated in paying higher wages to pursers, TWU and ALPA helped to cause the discrimination by regularly proposing the differential in bargaining and agreeing to it in contracts. Neither Title VII nor the Equal Pay Act was intended to lay all of the consequences of these years of collective bargaining solely at Northwest's door.

Not suprisingly, virtually every lower federal court to address the issue has concluded that an employer may seek contribution for a share of common liability under the

employment discrimination laws.[28] As these courts have recognized, a union's practical immunity from backpay liability would result in more persistent discrimination than if both unions and employers face realistic prospects of liability for discriminatory practices established in their collective bargaining contracts. This Court can preserve a meaningful incentive for unions to police employment practices and to insist on non-discriminatory collective bargaining agreements. To do this, the Court need only endorse the consensus reached by the lower courts and affirm an employer's right to pursue contribution from a union that caused the employer to discriminate or joined with the employer in the discriminatory practice.

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[28] *E.g., Glus v. G. C. Murphy Co., supra*, 23 F.E.P. Cas. 86, *aff'g district court after remand from* 562 F.2d 880 (3d Cir. 1977); *Denicola v. G. C. Murphy Co., supra*, 562 F.2d at 892 (upholding award of contribution under Title VII); *Myers v. Gilman Paper Corp.*, 544 F.2d 837 (5th Cir.), *modified on other grounds on rehearing*, 556 F.2d 758 (5th Cir.), *cert. dismissed*, 434 U.S. 801 (1977); *Stevenson v. International Paper Co., supra*, 432 F. Supp. 390; *International Union of Electrical, Radio & Machine Workers v. Westinghouse Electric Corp.*, 73 F.R.D. 57 (W.D.N.Y. 1976); *Grogg v. General Motors Corp.*, 72 F.R.D. 523 (S.D.N.Y. 1976); *Lynch v. Sperry Rand Corp.*, 62 F.R.D. 78 (S.D.N.Y. 1973); *Gilbert v. General Electric Co.*, 59 F.R.D. 267 (E.D. Va. 1973); *Osborne v. McCall Printing Co.*, 4 F.E.P. Cas. 276 (S.D. Ohio 1972); *Blanton v. Southern Bell Telephone & Telegraph Co.*, 49 F.R.D. 162 (N.D. Ga. 1970); *Torockio v. Chamberlain Manufacturing Corp.*, 51 F.R.D. 517 (W.D. Pa. 1970); *Communication Workers v. Illinois Bell Telephone Co., supra*, 12 E.P.D. ¶11,275; *Winfield v. St. Joe Paper Co.*, 15 F.E.P. Cas. 1497 (N.D. Fla. 1977) (contribution by union against employer); *see also Parson v. Kaiser Aluminum & Chemical Corp., supra*, 575 F.2d at 1389; *Patterson v. American Tobacco Co., supra*, 535 F.2d at 257; *Carey v. Greyhound Bus Co., Inc.*, 500 F.2d 1372 (5th Cir. 1974).

4. Allowing contribution will promote fairness and even-handed enforcement of the employment discrimination laws.

Allowing contribution, moreover, is a matter of fundamental fairness. Congress provided in Title VII and in the Equal Pay Act for a balanced, even-handed imposition of liability on both employers and unions. Equitable enforcement of that policy should, to the extent feasible, allocate the burdens of backpay liability among all those participants whom Congress has made responsible for the injury. When both employer and union are responsible, the decision of a potential plaintiff to sue the employer alone may be based upon whim, spite, cooption by the union, or ignorance of the union's involvement. There is nothing in either statute to suggest that Congress was conferring on the injured employees the power to determine the *ultimate* allocation of liability. A rule that would create that power would offend the principles of even-handedness embodied in these statutes.

The power to impose backpay liability under Title VII is one of the "full equitable powers" to achieve "complete justice" conferred by the statute. *Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 418. Since Title VII remedies are equitable, federal courts are not only permitted to apply equitable principles in granting relief, but are required to do so in exercising what the Court has aptly termed "equitable sensitivity." *Los Angeles Department of Water & Power v. Manhart, supra*, 435 U.S. at 718-20 & n.36; *see Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 416-17. Contribution is simply one part of the "full equitable powers" conferred on the courts by Title VII.[29]

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[29] *See Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944) ("equity [is] the instrument for the nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims").

The lower courts have already given effect to the objective of "complete justice" by apportioning backpay awards in cases where both employers and unions are before the court. For example, in *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 655-56 (5th Cir. 1974), an employee sued his employer and two unions alleging discrimination as a result of a job referral system established by the collective bargaining agreement. While both employer and unions were held liable, the "final responsibility for the monetary recovery" was placed upon the union because "the undisputed facts of this case identify the unions . . . as those principally responsible for plaintiff's loss . . . ." *Id.* at 656. The sound principle applied in *Guerra* is that "apportionment of the responsibility for equitable relief . . . falls within the sound discretion of the district court." *Id.* at 655.

The courts have repeatedly applied this principle in other cases.[30] It fully applies here as well. Equitable apportionment among defendants already before the

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[30] *See, e.g., Johnson v. Goodyear Tire & Rubber Co., supra*, 491 F.2d at 1381-82; *Myers v. Gilman Paper Co.*, 392 F. Supp. 413, 423-24 (S.D. G 1975), *aff'd*, 544 F.2d 837 (5th Cir.), *modified on other grounds on rehearing*, 556 F.2d 758 (5th Cir.), *cert. dismissed*, 424 U.S. 801 (1977) (50% liability for union, 50% liability for employer); *Bush v. Lone Star Steel Corp.*, 373 F. Supp. 526, 536-37 (E.D. Tex. 1974) (one-third liability for employer, two-thirds for unions). *See also EEOC v. Air Line Pilots Ass'n., supra*, 489 F. Supp. at 1009-10 (apportionment of monetary liability under Age Discrimination Act between ALPA and Northwest).

A comparative fault rule has been recognized by this Court as more just than a rule of equally divided, *pro rata* liability. *See United States v. Reliable Transfer Co.*, 421 U.S. 397, 406-08 (1975). Of course, if it is "impossible fairly to allocate degrees of fault, the division of damages equally between wrongdoing parties is an equitable solution." *Id.* at 407.

court is simply a "shortcut" so that "a separate contribution action is unnecessary . . . ." *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 271-72 n.30 (1979). If contribution were not recognized at all, however, the policies underlying equitable apportionment would be frustrated whenever an employee elected to target the employer alone with his claim. That result, however, would nullify this Court's sound judgment in *Cooper Stevedoring* that a " 'more equal distribution' of justice can best be achieved by ameliorating the . . . rule . . . which permits a plaintiff to force one of two wrongdoers to bear the entire loss." 417 U.S. at 111 (quoting *The Max Morris*, 137 U.S. 1, 14 (1890)).

The district court in this case, therefore, was correct in ruling that Northwest's claim for contribution for a portion of its Title VII liability states a valid claim on which relief may be granted. Both the district court and the court of appeals erred, however, in refusing to sanction a contribution claim for Equal Pay Act awards as well.

5. Recognizing contribution will not unduly complicate employment discrimination suits or lead to unjustified raids on union treasuries.

In unsuccessfully opposing contribution in the lower federal courts, unions have often come forward with an imaginative parade of "horribles" that would allegedly occur under the contribution principle. We anticipate and respond now to the two principal arguments that have been raised, neither of which can claim any evidentiary support despite years of experience in the lower courts with contribution claims.

1. One argument is that contribution will introduce unwarranted confusion into employment discrimination litigation. The progress of the case cannot be impeded, however, if, as in this case, the employer defers assertion

of any claim for contribution until there is a determination that the employer himself bears some liability. The employer's later demand for contribution from the union cannot complicate the employees' assertion of their separate complaint. Indeed, as Judge Higginbotham recently explained in *Glus v. G. C. Murphy Co.*, *supra*, 23 F.E.P. Cas. at 92, a potential claim for contribution may facilitate early resolution of the employees' complaint by assuring the employer that he will not have to bear the full load of any liability. *See also Myers v. Gilman Paper Corp.*, *supra*, 544 F.2d at 845.

Even when contribution is demanded through a cross-claim or third-party claim in the employees' original suit, the possibility of significantly complicating the litigation is slim. There is virtually no additional litigation if the employees have chosen to name the union as a co-defendant. If the employer must implead the union, only one or two additional defendants will be present. In this respect, employment discrimination cases are far more streamlined than, for example, antitrust cases, where a defendant may seek to assert cross-claims or third-party claims for contribution against a large number of other firms in an industry.

In an employment discrimination case, the allocation of fair shares of the backpay liability between employer and union is a relatively simple task for the court once the court resolves the main issues of discrimination and relief. The federal courts have ample flexibility to manage the conduct of this type of litigation efficiently. Minor increments in the number of issues or parties scarcely justify rejection of all contribution claims at the courthouse door.

2. In opposing certiorari in this case, ALPA argued that contribution could impose financial hardships on unions (ALPA Brief in Opp. 17 fn.). That speculation furnishes no basis for wholesale rejection of contribution.

The argument overlooks the inescapable fact that contribution threatens no liability beyond what Congress has already decided is proper in compensating employees for union-caused discrimination.

In making this decision to hold unions equally accountable for redressing the effects of their discrimination, Congress acted with full knowledge that the major labor unions—like TWU and ALPA—are often more secure financially than the thousands of employers with whom they bargain. The spectre of large employers driving helpless unions to the financial wall is an illusion. Labor Department statistics show that most union members belong to huge national unions or their affiliates. Sixteen unions represented 60% of total union membership in 1976. *BLS Union Directory, supra*, at 63. A very "small number of unions [make] a large proportion of all collective bargaining agreements." *Id.* at 78. For example, two-thirds of all 193,000 labor contracts entered into in the United States in 1976 covered the members of only ten unions. Moreover, a total of only 170 unions negotiated contracts with 242,000 employers in that year. *Id.*

Since most labor contracts are negotiated between large, powerful unions and relatively small employers, the likely scenario is a contribution claim by a local employer against a large union with abundant resources. The danger of large companies overpowering impotent unions by asserting contribution claims is, at best, remote. Surely neither TWU nor ALPA should be heard to voice an argument about acute financial embarrassment.[31] There is,

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[31] According to the Labor Organization Annual Report Form LM-2, which unions are required to file annually with the Department of Labor under § 201(b) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 431(b), in fiscal year 1979 TWU had total receipts of $8.13 million. ALPA for that year reported total receipts of $61.74 million.

(footnote continued on following page)

therefore, no compelling reason for this Court to create an absolute immunity for unions in defiance of deliberate congressional policy.

Furthermore, the apportionment of liability through contribution is an equitable remedy. Courts of equity will apportion liability commensurate with the conduct of each party responsible for the injury and with sensitivity to any unusual hardship that liability may impose. *See Los Angeles Department of Water & Power v. Manhart*, *supra*, 435 U.S. at 718-22; *Restatement (Second), Torts*, § 886A, comment c. *See also* Prosser, *Law of Torts*, § 50, at 310 (4th ed. 1971). Unions, therefore, cannot honestly offer the spectre of large contribution awards bleeding dry the treasuries of impoverished but blameless labor organizations. Courts can easily deal with serious hardships in any case in which a union's "fair share" of backpay liability exceeds its ability to pay. First, though, this Court should affirm the existence of the contribution right itself.

II. NO SPECIAL RULES GOVERNING TIMELINESS AND PROCEDURE SHOULD APPLY TO CONTRIBUTION CLAIMS IN EMPLOYMENT DISCRIMINATION CASES.

A. Contribution Claims May Always Be Asserted In A Separate Action Filed After Judgment Is Entered In The Underlying Case.

For many years it was hornbook law that a contribution claim did not accrue until the party seeking contribution actually paid a disproportionate share of a judgment.

(footnote continued from preceding page)

As of 1976, reporting labor unions disclosed total assets of $3.93 billion (exclusive of assets held by their pension funds). *See* U.S. Department of Labor, Labor Management Services Administration, *Union Financial Statistics 1976*, at 6-7. The unions reported total annual receipts of $6.16 billion. *Id.* at 12. ALPA ranked seventh in the country in amount of annual receipts among all national unions. *Id.* at 33.

A claim brought before payment was therefore considered premature. Prosser, *Law of Torts*, § 50, at 309 n.80 (4th ed. 1971). While the rule requiring actual payment before assertion of a contribution claim has persisted in some courts, others have modified it to the extent of allowing a contingent contribution claim to be asserted by a cross-claim or third-party claim in the main lawsuit. 3 Moore, *Federal Practice* ¶¶14.03[3], 14.08, 14.11 (2d ed. 1979).

The timing of Northwest's suit was in line with an interim course. Northwest first attempted to assert its claim in the *Laffey* case, eight days after the district court entered a judgment imposing liability, but before appellate review or payment of any monetary award. That attempt failed for procedural reasons. When Northwest filed a separate lawsuit a few months later, ALPA and TWU responded with a defense of "laches" (JA 29 ¶26, 34 ¶15). The district court did not pass on this alleged defense, but the court of appeals remanded Northwest's contribution claim for a determination whether the claim is barred by laches (Pet. App. 13d). As a matter of law, however, an element necessary to establish "laches" —unreasonable delay—cannot exist in this case.[32]

The long-standing and uniform rule is that a contribution claim may be asserted in a separate action brought within a reasonable time after payment of the judgment by the party seeking contribution.[33] Northwest was entitled to rely on this rule in making its decision to wait at

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[32] The other essential element, actual prejudice, has not been probed here. *See, e.g., Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 424; *Costello v. United States*, 365 U.S. 265, 282 (1961); *Bernard v. Gulf Oil Co.*, 596 F.2d 1249, 1256 (5th Cir. 1979).

[33] *See, e.g., Keleket X-Ray Corp. v. United States*, 275 F.2d 167, 169 (D.C. Cir. 1960); *Smith v. Whitmore*, 270 F.2d 741 (3d Cir. 1959); *DeVore Brokerage Co. v. Goodyear Tire & Rubber Co.*, 308 F. Supp. 279 (M.D. Tenn. 1969); *Huggins v. Graves*, 210 F. Supp. 98, 104 (E.D. Tenn. 1962), *aff'd*, 337 F.2d 486 (6th Cir. 1964);

(footnote continued on following page)

least until the district court decided whether Northwest had any liability at all before bringing its contribution claim. This type of patience is eminently reasonable, since it avoids skirmishing over cross-claims that could turn out to be utterly unnecessary if the employees fail to prove their discrimination claim. In addition, Northwest could hardly have attempted to cross-claim against ALPA in the *Laffey* suit, since ALPA did not displace TWU as the cabin attendants' bargaining representative until 1971 and did not enter into a contract with Northwest until December 1972—by which time the *Laffey* trial was already under way.

Indeed, in the district court ALPA moved to dismiss or stay Northwest's contribution claim as "premature," arguing that a right to contribution does not even arise until a judgment actually has been paid. Thus, ALPA contended, Northwest's claim was not yet "ripe" (JA 1, 28 ¶ 21; Pet. App. 36 n.6). There are some cases that suggest that conclusion,[34] but modern doctrine, including the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.*, invoked by Northwest (JA 16, 20-21, ¶¶4, 11, 13, 15, 16), no longer requires this postponement. The district court,

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(footnote continued from preceding page)

Falciani v. Philadelphia Transportation Co., 189 F. Supp. 203 (E.D. Pa. 1960); Prosser, *Law of Torts* § 50, at 309 (4th ed. 1971).

The Uniform Contribution Among Tortfeasors Act, 12 U.L.A. 57 (1975), promulgated in 1955 and adopted in many states, proposes that a contribution claim must be brought within one year of the date on which the judgment of liability becomes final after appeal or after the time to appeal has lapsed. Section 3(c), 12 U.L.A. at 88.

[34] *E.g.*, *Minneapolis S.P. & S.S.M. R. Co. v. City of Fond Du Lac*, 297 F.2d 583, 585 (7th Cir. 1961); *Harris v. Standard Accident & Insurance Co.*, 297 F.2d 627, 635 (2d Cir. 1961), *cert. denied*, 369 U.S. 843 (1962); *Val Marine Corp. v. Costas*, 256 F.2d 911, 916 (2d Cir. 1958); *Dennler v. Dodge Transfer Co.*, 201 F. Supp. 431 (D. Conn. 1962); *Bair v. Bryant*, 96 A.2d 508, 510 (D.C. Ct. App. 1953); *see generally* 18 Am. Jur. 2d *Contribution* § 50, at 72 (1965).

therefore, properly ruled that Northwest's complaint raised a real, timely controversy and that Northwest would "suffer substantial prejudice" from further deferral of the contribution action, as ALPA urged. *Northwest Airlines, Inc. v. Transport Workers Union*, 10 E.P.D. ¶10,484 (D.D.C. 1975).

Against this backdrop, it would be quite ironic to label as "unreasonable delay" Northwest's reliance on long-standing precedent in deferring its contribution claim until eight days after entry of the adverse judgment. Absolutely nothing in Title VII or the Equal Pay Act suggests that the traditional rule governing the timeliness of contribution claims should not apply here. Even if in some case it might be unreasonable to wait until actual payment of the judgment after years of appellate proceedings, this Court should conclude that, as a matter of law, there is no unreasonable delay when an employer asserts a contribution claim promptly after the trial court's determination of the employer's liability.

B. Special Procedural Rules Governing Contribution For Employment Discrimination Liability Are Unwarranted.

In the court of appeals, the EEOC agreed that contribution should be permitted under Title VII (taking no position on the Equal Pay Act issue because it then lacked responsibility for enforcing that Act). The EEOC also acknowledged that contribution claims generally may be asserted in separate actions brought after the underlying liability is adjudicated and satisfied.[35]

The EEOC, nevertheless, also took the position that the courts should create a novel, rigid procedural rule that in Title VII cases the employer must assert a contribution claim at the outset of the original Title VII litigation and must first ask the EEOC to attempt conciliation of its

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[35] Brief of the EEOC as *amicus curiae*, filed in the court of appeals June 16, 1978, at 39-57.

claim against the union pursuant to Sections 705(g)(4) and 706(f)(1) of the Act, 42 U.S.C. §§ 2000e-4(g)(4) and 5(f)(1). EEOC Br. at 59-66. The EEOC had never suggested these conditions in any other case, and none of the many courts that have entertained employers' contribution claims have imposed any such requirements. The suggested conditions lack any legitimate foundation.

1. The federal joinder and cross-claim rules are purely permissive. *See* Fed. R. Civ. P. 13(g), (h), 14(a); 3 Moore, *Federal Practice*, ¶14.06 (2d ed. 1979). The EEOC's position, however, would inject for one category of contribution claims an exception that would be at odds with the flexible alternatives carefully preserved by the Federal Rules. Nothing in Title VII or the Equal Pay Act manifests any congressional intent to create a special iron-clad rule of compulsory cross-claims and third-party claims for contribution in this field.

2. Equally misguided is the EEOC's attempt to transform the permissive conciliation process under Sections 705(g)(4) and 706(f)(1) into a mandatory prerequisite for Title VII contribution. These provisions by their terms are permissive. Employees may bypass the conciliation process and request a right-to-sue letter before the EEOC undertakes any conciliation efforts. That is precisely what the *Laffey* plaintiffs did, filing their complaint in court before the EEOC undertook any conciliation and, indeed, before Northwest received notice that an EEOC charge had been filed. The courts have uniformly held that resort to conciliation is not a precondition to suits by the employees who file the charges.[36]

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[36] Neither actual notice of the filing of a charge nor conciliation by the EEOC is a prerequisite to a Title VII suit against the charged party. *See Russell v. American Tobacco Co.*, 528 F.2d 357, 365 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); *Miller v. International Paper Co.*, 408 F.2d 283, 290-91 (5th Cir. 1969); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357, 361 (7th Cir. 1968).

There is no reason why an employer's contribution claim should be subject to tighter strictures than the employee's underlying charge.

Moreover, an employer's request for conciliation is not necessary to trigger EEOC action or union participation in conciliation. Where the charge filed with the EEOC implicates a collective bargaining agreement, the EEOC's own procedure is to involve the union in any conciliation efforts it undertakes. EEOC *Compliance Manual* (CCH) § 62.7(c) (1979). In this case, the EEOC did not undertake conciliation because the employees were unwilling to wait for it. Had conciliation been undertaken, the *Laffey* plaintiffs' charge would have alerted the EEOC that the terms of a collective bargaining agreement were at issue. Thus, in this case, the EEOC would have had an opportunity to conciliate with all parties, including the incumbent unions. It was the *Laffey* plaintiffs' eagerness to file suit, rather than Northwest's failure to request conciliation, that precluded any conciliation efforts by the EEOC. Within a statutory framework where the aggrieved employees may circumvent EEOC conciliation machinery, no purpose would be served by a rule that conditions a contribution action on an employer's request for conciliation.

3. In any event, it would be quite unfair and improper to impose retroactively any procedural rules of the kind suggested by the EEOC to bar Northwest's contribution claim. Neither in 1970 nor in 1975 did Northwest have any reason to suspect that a Title VII contribution claim would be barred if it simply awaited the trial judge's decison on the merits in *Laffey*. Since the EEOC has never complied with statutory rule-making requirements for the "statement of policy" or "interpretation" suggested in the court below, the Administrative Procedure Act, 5 U.S.C. § 552(a)(2), expressly protects Northwest from being prejudiced by the EEOC's suggestion.

C. The Failure To File An EEOC Charge Against A Union Does Not Bar An Employer's Claim For Contribution.

ALPA and TWU have argued that they are immunized from liability for contribution for Title VII backpay because the *Laffey* plaintiffs did not file charges against them with the EEOC. This argument has been soundly rejected by the lower federal courts.

Title VII generally requires that a "person aggrieved" by violation of Title VII must file a timely charge with the EEOC before he or she may bring an action in court under Title VII. Section 705(e), 42 U.S.C. § 2000e-5(e). Thus, because the *Laffey* plaintiffs filed no EEOC charge against the unions, they may have lost their right to press a backpay claim against the unions for the unions' Title VII violations. But to allow that fact to control the employer's right to contribution would be to repudiate the whole purpose of contribution: to prevent the original plaintiff from dictating the ultimate allocation of liability.

As the EEOC acknowledged below, the charge-filing requirement is irrelevant to the employer's rights. Northwest as an employer lacked standing itself to file a Title VII charge against the unions. *Foust v. Safeway Stores, Inc.*, 556 F.2d 946, 947 (9th Cir. 1977). It is asserting a federal common law right of contribution, not a discrimination claim under Title VII itself. *See Glus v. G. C. Murphy Co., supra*, 23 F.E.P. Cas. at 88. Thus, Northwest's rights do not depend upon the filing of a Title VII charge by any person.

For this reason, the absence of a charge against the unions poses no jurisdictional obstacle to the contribution claim. A contribution claim may be brought in federal court under general federal question jurisdiction, 28 U.S.C. § 1331, and is not subject to the statutory prerequisites of Title VII. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975) (employment discrimination action may be brought under 42 U.S.C. § 1981

regardless of compliance with Title VII procedures).[37] The routine recognition of contribution rights by lower courts even where no EEOC charges had been filed against the unions demonstrates the inapplicability of the charge-filing procedure here.[38]

The employer's contribution suit against the union requires only that the unions once have had potential liability to the original plaintiffs. Any procedural defenses to the enforcement of the unions' direct liability to the employees are irrelevant to a contribution claim, once the employees have obtained a judgment against a concurrent tortfeasor. The courts have consistently held, in the most analogous situation, that the running of a statute of limitations against the original plaintiff's cause of action does not bar the claim for contribution.[39] The contribution claim has an independent life of its own.

Accordingly, Northwest has established all of the predicates for its contribution claims, and there are no special procedural hurdles to the enforcement of these claims at a trial on the merits. The Court should now allow Northwest to prove its case.

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[37] The district court below also held that "the uncontested allegations in the complaint reveal that the Court has diversity jurisdiction, pursuant to 28 U.S.C. § 1332, and [Northwest] has alleged such jurisdiction in its complaint." (Pet. App. 8b). The scope of Northwest's contribution rights under applicable state law is not before the Court.

[38] *E.g., Glus v. G. C. Murphy Co., supra*, 23 F.E.P. Cas. at 88 & n.1; *Grogg v. General Motors Corp., supra*, 72 F.R.D. at 528; *McDonald v. General Mills, Inc.*, 387 F. Supp. 24, 37-38 (E.D. Cal. 1974); *Osborne v. McCall Printing Co., supra*, 4 F.E.P. Cas. at 279.

[39] *See, e.g., Keleket X-Ray Corp. v. United States, supra*, 275 F.2d 167; *Cooper v. Philadelphia Dairy Products Co.*, 34 N.J. Super. 301, 112 A.2d 308 (1955); *Godfrey v. Tidewater Power Co.*, 223 N.C. 647, 27 S.E.2d 736 (1943); *Ainsworth v. Berg*, 253 Wis. 438, 34 N.W.2d 790 (1948), *on rehearing*, 253 Wis. 445a, 35 N.W.2d 911 (1949). *See also Nolechek v. Gesuale*, 46 N.Y.2d 332, 413 N.Y.S.2d 340, 385 N.E.2d 1268 (1978); *Smith v. Southern Farm Bureau Cas. Ins. Co.*, 247 La. 695, 174 So.2d 122 (1965).

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded with directions (1) to reverse the district court's judgment dismissing the Equal Pay Act contribution claim and (2) to affirm the district court's order denying the motions to dismiss the Title VII contribution claim.

Respectfully submitted.

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APPENDIX A

STATES THAT RECOGNIZE CONTRIBUTION

Alaska:	*Arctic Structures, Inc.* v. *Wedmore*, 605 P.2d 426 (Alaska 1979)
Arkansas:	*Commercial Casualty Insurance Co.* v. *Leonard*, 210 Ark. 575, 196 S.W.2d 919 (1946)
California:	*Augustus* v. *Bean*, 56 Cal. 2d 270, 14 Cal. Rptr. 641, 363 P.2d 873 (1961)
Colorado:	*Coniaris* v. *Vail Associates, Inc.*, 586 P.2d 224 (Colo. 1978)
Delaware:	*Halifax Chick Express, Inc.* v. *Young*, 50 Del. 596, 137 A.2d 743 (1958)
District of Columbia:	*George's Radio, Inc.* v. *Capital Transit Co.*, 126 F.2d 219 (D.C. Cir. 1942)
Florida:	*Lincenberg* v. *Issen*, 318 So.2d 386 (Fla. 1975)
Georgia:	*Traveler's Indemnity Co.* v. *Liberty Loan Corp.*, 140 Ga. App. 458, 232 S.E.2d 399 (1976)
Hawaii:	*Tamashiro* v. *DeGama*, 51 Hawaii 74, 450 P.2d 998 (1969)
Idaho:	*Brockman Mobile Home Sales* v. *Lee*, 98 Idaho 530, 567 P.2d 1281 (1977)
Illinois:	*Skinner* v. *Reed-Prentice Div. of Package Machinery Co.*, 70 Ill. 2d 1, 374 N.E.2d 437 (1977), *cert. denied*, 436 U.S. 946 (1978).
Iowa:	*Best* v. *Yerkes*, 247 Iowa 800, 77 N.W.2d 23 (1956)
Kansas:	*City of Fort Scott* v. *Kansas City, F.S. & M. R. Co.*, 66 Kan. 610, 72 P. 238 (1903)
Kentucky:	*Consolidated Coach Corp.* v. *Burge*, 245 Ky. 631, 54 S.W.2d 16 (1932)
Louisiana:	*Smith* v. *Southern Farm Bureau Casualty Insurance Co.*, 247 La. 695, 174 So.2d 122 (1965)
Maine:	*Hobbs* v. *Hurley*, 117 Me. 449, 104 A. 815 (1918)
Maryland:	*O'Keefe* v. *Baltimore Transit Co.*, 201 Md. 345, 94 A.2d 26 (1953)
Massachusetts:	*Hayon* v. *Coca Cola Bottling Co. of New England*, 1978 Mass. Adv. Sh. 1888, 378 N.E.2d 442 (1978)
Michigan:	*Duncan* v. *Beres*, 15 Mich. App. 318, 166 N.W.2d 678 (1968)
Minnesota:	*Duluth M. & N. Ry. Co.* v. *McCarthy*, 183 Minn. 414, 236 N.W. 766 (1931)

Mississippi:	*Klass* v. *Continental Southern Lines, Inc.*, 225 Miss. 94, 82 So.2d 705 (1955)
Missouri:	*Miller* v. *United Railways Co. of St. Louis*, 155 Mo. App. 528, 134 S.W. 1045 (1911)
Nebraska:	*Royal Indemnity Co.* v. *Aetna Casualty & Surety Co.*, 193 Neb. 752, 229 N.W.2d 183 (1975)
Nevada:	Nev. Rev. Stat. §§ 17.225-17.305 (1973)
New Hampshire:	*Scahill* v. *Miniter*, 101 N.H. 56, 132 A.2d 140 (1957)
New Jersey:	*Scattelberger* v. *Telep*, 14 N.J. 353, 102 A.2d 577 (1954)
New Mexico:	*Barley* v. *Jeffries-Eaves, Inc.*, 76 N.M. 278, 414 P.2d 503 (1966)
New York:	*Nolechek* v. *Gesuale*, 46 N.Y.2d 332, 413 N.Y.S.2d 340, 385 N.E.2d 1268 (1978)
North Carolina:	*Taylor* v. *Kinston Free Press Co.*, 237 N.C. 551, 75 S.E.2d 528 (1953)
North Dakota:	*Bartels* v. *City of Williston*, 276 N.W.2d 113 (N.D. 1979)
Ohio:	*Walsh* v. *Jellen*, 51 Ohio Misc. 97, 5 Ohio Op. 3d 176 (C.P. 1977)
Oregon:	*Miller* v. *City of Portland*, 288 Or. 271, 604 P.2d 1261 (1980)
Pennsylvania:	*Anstine* v. *Pennsylvania R. Co.*, 352 Pa. 547, 43 A.2d 109 (1945)
Rhode Island:	*Hacket* v. *Hyson*, 72 R.I. 132, 48 A.2d 353 (1946)
South Dakota:	*Degen* v. *Bayman*, 90 S.D. 400, 241 N.W.2d 703 (1976)
Tennessee:	*Velsicol Chemical Corp.* v. *Rowe*, 543 S.W.2d 337 (Tenn. 1976)
Texas:	*Austin Road Co.* v. *Pope*, 147 Tex. 430, 216 S.W.2d 563 (1949)
Utah:	*Rees* v. *Albertson's, Inc.*, 587 P.2d 130 (Utah 1978)
Virginia:	*McKay* v. *Citizens Rapid Transit Co.*, 190 Va. 851, 59 S.E.2d 121 (1950)
West Virginia:	*Haynes* v. *City of Nitro*, 240 S.E.2d 544 (W. Va. 1978) (citing *Buskirk* v. *Sanders*, 70 W.Va. 363, 73 S.E. 937 (1912))
Wisconsin:	*Ellis* v. *Chicago & N.W.Ry. Co.*, 167 Wis. 392, 167 N.W. 1043 (1918)
Wyoming:	*Chrysler Corp.* v. *Todorovich*, 580 P.2d 1123 (Wyo. 1978)